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No. ----------

In The Supreme Court of the United States

OCTOBER TERM, 1983

EVERETT HODGES, III,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May 1983

QUESTIONS PRESENTED FOR REVIEW

1. Is there a private cause of action cognizable under Section 503 of the Rehabilitation Act of 1973?

2. May a handicapped individual bring a breach of contract action as a third party beneficiary of a contract or affirmative action plan between an employer and the federal government?

3. If the plaintiff relies on unfair labor representation as a defense to the requirements under the Railway Labor Act, must the union be a named party to the suit?

4. Is the Railway Labor Act applicable in a case where the plaintiff is not a member of a labor union and the action is not based on the collective bargaining agreement?

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In The
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EVERETT HODGES, III,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published *Hodges v. Atchison, Topeka & Santa Fe Ry.*, 728 F.2d 414 (10th Cir. 1984). Petitioner did not seek a rehearing.

JURISDICTION

Judgment in accordance with the opinion of the Court of Appeals was entered on February 13, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following portion of the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq.*, is relevant to this appeal:

> (a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706 (7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.
>
> (b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.
>
> * * *

29 U.S.C. §793.

29 U.S.C. §794 a (b)

In any action or proceeding to enforce or charge a violation of a provision of this title, the Court in its discretion may allow the prevailing party, other than the United States, a reasonable attorney fee as part of the cost.

The following portion of the Railway Labor Act, 45 U.S.C. §151 *et seq.*, is relevant to this appeal:

Section 3

First. There is established a Board, to be known as the "National Railroad Adjustment Board"...and it is provided—

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

45 U.S.C. §153 First (i), (j) & (m).

STATEMENT OF THE CASE

Petitioner filed suit against the respondent in Oklahoma state court alleging wrongful employment discharge. Specifically, the petitioner alleged breach of contract on the part of the respondent as well as violation of 29 U.S.C. §793 (Section 503 of The Rehabilitation Act of 1973) which prohibits discrimination against handicapped individuals. In August, 1981, the respondent filed with the United States District Court for the Western District of Oklahoma a petition and bond for removal of petitioner's action. The cause was removed to that court.

On January 29, 1982, the respondent moved the district court to grant summary judgment in its favor. The district court granted the motion for summary judgment. The distric court held (1) that any claim based directly or indirectly on Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793, could not be maintained because there exists no private right of action under the statute, and (2) that the court lacked jurisdiction to entertain plaintiff's breach of employment contract by virtue of the Railway Labor Act, 45 U.S.C. §151 *et. seq.* Thereafter, petitioner perfected an appeal to the Tenth Circuit Court of Appeals. On February 13, 1984, the Court of Appeals entered its award affirming the district court's ruling. The petitioner prays to this Court for relief from these judgments.

REASONS FOR GRANTING THE WRIT

I.

THERE IS AN IMPLIED PRIVATE CAUSE OF ACTION UNDER SECTION 503 OF THE REHABILITATION ACT OF 1973.

The issue of whether or not Section 503 of the Rehabilitation Act of 1973 provides a private cause of action has not been addressed by this Court. This question is of great importance both for the millions of handicapped individuals who have waited and labored to see their right to equal treatment established in the law along with the rights of other groups who have been victims of invidious discrimination and also for the jurisprudence of implied

private rights of actions. *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980) (Goldberg, dissenting op 611 F.2d at 1085). Although no court of appeals decision has recognized a private cause of action, several district courts have so ruled. *California Paralyzed Veterans Association v. FCC*, 496 F. Supp. 125 (C.D. Cal. 1980); *Clark v. FELEC Serv. Inc.*, 489 F. Supp. 165 (D. Alaska 1980); *Hart v. County of Alameda*, 485 F. Supp 66 (M.D. Cal. 1979); *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809 (E.D. Pa. 1977).

This Court has made it clear that courts are to find implied remedies when persuasive evidence of Congressional intent supports them. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677 (1979). The most illuminating legislative history accompanied the passage of the 1978 attorney fees amendment, section 505 29 U.S.C. §794 a (b). Congress enacted section 505 in response to fears that the expense was dissuading handicapped employees from vindicating their rights. The Senate Report accompanying section 505 gives irrefutable evidence that a section 503 private cause of action is one of the tools that Congress expected would be used to vindicate those rights. It proclaims, "(T)he availability of attorney's fees should assist in vindicating private rights of action in...(section) 503 cases..." S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978). Where congressional intent is discernable, the court must give effect to that intent. *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 216 (1962). The Court of Appeals, in the present case, failed to give credence to clear legislative pronouncement, Therefore, the Court of Appeals has so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Court of Appeals relied on the case of *Rogers v. Frito Lay Inc., supra*. However, the Fifth Circuit's decision fails to consider the importance of the legislative history and has been so criticized. See Note, 79 *Mich. L. Rev.* 1093, 1104–1105. The attorney fees provision constitutes an unimpeachable statement by Congress that it understood section 503 to include an implied private remedy.

The Court of Appeals stressed the theory that the comprehensive remedial scheme dictates against implying another remedy.

However, the Court of Appeals failed to consider that this Court has supplemented an express administrative remedy with an implied judicial remedy, most notably under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. *Cannon v. University of Chicago, supra,* at 694-703. Therefore, the Court of Appeals has decided a federal qustion in a way which conflicts with applicable decisions of this Court.

The writ should be granted to consider this important issue concerning an implied cause of action.

II.

PETITIONER HAS A COMMON LAW RIGHT TO SUE FOR BREACH OF CONTRACT.

Petitioner submits that, even if §503 does not in itself create a private cause of action, he has a common law right to sue for breach of contract. The respondent has asserted that petitioner's discharge was because petitioner failed to disclose injury to his back or prior employment with the respondent. However, an agent of the respondent told the petitioner not to mention these items. The reason petitioner was told not to mention his prior medical condition was because questions pertaining to this subject are illegal under 29 U.S.C.S. Section 793, 41 CFR, parts 60–250, 70–741. The respondent should be estopped to deny directions given by its own agent. Also, the Court of Appeals failed to find that the petitioner is a third party beneficiary to the respondent's contracts with the United States Government. This theory of recovery has never been addressed by this Court and should be considered in order to determine if handicapped individuals have a right of recovery.

III.

THE RAILWAY LABOR ACT IS NOT THE PLAINTIFF'S EXCLUSIVE REMEDY.

The Court of Appeals concluded that the petitioner could not maintain suit in the district court because he is obligated, under the Railway Labor Act, to seek relief primarily and exclusively

through arbitration. However, since petitioner's action is not based on the collective bargaining agreement such a holding is in error. The petitioner contends that his cause of action arises either under the laws of the State of Oklahoma, as a matter of contract law, or under the Rehabilitation Act of 1973. Thus, the case is distinguishable from *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972) relied on by the Court of Appeals.

Even if the Railway Labor Act was applicable, the petitioner's claim would not be barred. The petitioner states that he was not a member of the union. The petitioner was specifically told he could not bring a grievance. In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court said an employee shall be excused from having to exhaust his administrative remedies if the employee can show that the union breached its duty of fair representation in processing his claim. A question never before considered by this Court is presented. Must the petitioner, as the Court of Appeals suggests, name the union as a party to the lawsuit in order to claim the exception? Petitioner suggests that there is no such requirement.

The Tenth Circuit Court of Appeals decision not allowing an exception to petitioner appears to conflict with rulings of other circuits. *Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902 (6th Cir. 1983); *Schum v. South Buffalo Railway Co.*, 496 F.2d 328 (2d Cir. 1974). Thus, if the Railway Labor Act is applicable to the petitioner, the Court of Appeals failed to follow the established procedure and grant him an exception. However, petitioner believes that the Act is inapplicable because he never was a member of the union.

The Court is also faced with an issue never before addressed by this Court—Does the Rehabilitation Act of 1973 provide a personal cause of action which supplements remedies available in a collective bargaining agreement. Petitioner believes his case is similar to the action brought by the plaintifff in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000-e, claiming he was a

victim of racial discrimination. This Court held that although the plaintiff had gone through the grievance procedure provided under the collective bargaining agreement and lost, that Title VII indicated that a congressional attempt to allow the plaintifff to pursue independently his rights under Title VII. The court concluded that the statutory scheme provided a personal cause of action which supplemented remedies in a collective bargaining agreement.

Respectfully submitted,

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May 1983

CERTIFICATE OF MAILING

On this 13th day of May, 1984, a true and correct copy of the foregoing was deposited in the United States mail, postage prepaid, and mailed to Ronald Lane and John J. Fleps, 80 East Jackson Boulevard, Chicago, Illinois 60604 and H.D. Binns, Jr., 735 First National Center West, Oklahoma City, Oklahoma 73102.

Everett E. HODGES, III,
Plaintiff-Appellant,

v.

The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant-Appellee.

No. 82-2112.

United States Court of Appeals,
Tenth Circuit.

Feb. 13, 1984.

SETH, Chief Judge.

This appeal involves the discharge of Everett E. Hodges, III by the Atchison, Topeka and Santa Fe Railway Company. Mr. Hodges was discharged during an initial probationary period because of incorrect statements in his job application. He sued Santa Fe for wrongful discharge asserting that the Rehabilitation Act of 1973 (29 U.S.C. § 793) provides for a private right of action such as he filed. Mr. Hodges appeals from the District Court's summary judgment in favor of Santa Fe.

The District Court found that Mr. Hodges could not maintain his action based directly or indirectly on § 503 of the Rehabilitation Act of 1973 because the statute does not provide for a private right of action. Furthermore, the court held that it lacked jurisdiction to entertain Mr. Hodges' claim insofar as it was based on the Railway Labor Act.

Mr. Hodges argues that a private right of action may be implied from the language of the Rehabilitation Act, which states in part:

> "§ 793. Employment under Federal contracts
>
> "(a) Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations

> "Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title . . .
> "Administrative enforcement; complaints; investigations; departmental action
> "(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto."

Whether § 793 creates a private right of action has been considered by several courts of appeal, all of which have concluded that neither the legislative history nor the Act in general support the inference of Congressional intent to create a private right of action. *Meyerson v. State of Arizona*, 709 F.2d 1235, 1238 (9th Cir.1983); *Davis v. United Air Line, Inc.*, 662 F.2d 120, 123–26 (2d Cir.1981); *Simpson v. Reynolds Metals Co., Inc.* 629 F.2d 1226, 1240–43 (7th Cir.1980); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080–84 (5th Cir.1980). As stated in *Rogers:*

> "There is no intimation that every qualified handicapped person has a right to affirmative action in his particular case; what is apparent is that those who control federal contracts have a duty to make and enforce contracts containing the requisite clause. The handicapped may have simply the right to petition those who administer federal contracts to perform their duty."

Mr. Hodges argues that a private cause of action may be implied from the passage of 29 U.S.C. § 794a which permits an

award of attorney's fees to successful litigants under Title V of the Act, which includes § 793(a):

> "In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Section 505(b), 29 U.S.C. § 794a(b).

Mr. Hodges cites remarks made in 1978 by Senator Cranston to show Congressional intent to create a private right of action. The court in *Rogers* said of such statement that it was a commentary and not part of the legislative history. Mr. Hodges argues also that legislative history supports the inference of a private right of action. However, under *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26, an implied right of action is only one of four requirements which must be met in order to imply a remedy. The Court in *Cort* said:

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted.' *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 [36 S.Ct. 482, 484, 60 L.Ed. 874] (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e.g.*, *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 460 [94 S.Ct. 690, 694, 38 L.Ed.2d 646] (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e.g.*, *Amtrak*, *supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 [95 S.Ct. 1733, 1740, 44 L.Ed.2d 263] (1975); *Calhoon v. Harvey*, 379 U.S. 134 [85 S.Ct. 292, 13 L.Ed.2d 190] (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based

solely on federal law? See *Wheeldin v. Wheeler*, 373 U.S. 647, 652 [83 S.Ct. 1441, 1445, 10 L.Ed.2d 605] (1963); *cf. J.I. Case Co. v. Borak*, 377 U.S. 426, 434 [84 S.Ct. 1555, 1560, 12 L.Ed.2d 423] (1964); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394–395 [91 S.Ct. 1999, 2003–2004, 29 L.Ed.2d 619] (1971); *id.*, at 400 [91 S.Ct. at 2006] (Harlan, J., concurring in judgment)."

On this point, the comprehensive remedial scheme provided in the statute dictates against implying another remedy. Mr. Hodges does not even address these other factors. We find no implied right or remedy in the statute.

We have considered Mr. Hodges' argument that he is a third-party beneficiary under the provisions in Santa Fe's federal contracts which prohibit discrimination against the handicapped, pursuant to § 503. This is but another aspect of the implied right of action argument. *See Hoopes v. Equifax, Inc.*, 611 F.2d 134, 135 (6th Cir.1979).

Mr. Hodges further contends that the Railway Labor Act does not bar his action because it is based on a common law contract rather than a collective bargaining agreement and because the union's alleged misconduct excuses resort to the National Railroad Adjustment Board.

Section 3 of the Railway Labor Act, 45 U.S.C. § 153, has been interpreted to confer primary and exclusive jurisdiction of railroad employees' labor contract disputes to the National Railroad Adjustment Board and the public law boards. *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95; *Order of Conductors v. Pitney*, 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed. 318. Even though Mr. Hodges alleges breach of an employment agreement and not the collective bargaining agreement itself he is still obliged to seek relief primarily and exclusively through arbitration. *Andrews*, 406 U.S. at 322–24, 92 S.Ct. at 1564–65.

Mr. Hodges asserts that because he was not a union member the collective bargaining agreement cannot control his contract claim. However, Mr. Hodges' employment in the craft governed by the applicable collective bargaining agreement makes him sub-

ject to the terms and conditions of employment obtained in the agreement, and the collective bargaining agent was obliged to represent him. *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842; *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202–04, 65 S.Ct. 226, 231–33, 89 L.Ed. 173. Thus, his union membership is irrelevant to the applicability of the collective bargaining agreement. The existence of a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry preempts state law action for wrongful discharge. *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.1978).

Mr. Hodges asserts that because the union breached its duty of fair representation he is excused from pursuing his claim through administrative procedures. This argument is based on the reasoning developed in "hybrid" cases in which the employee sues both the employer and the union because they allegedly combined in some ways to obtain or maintain the discharge. *Richins v. Southern Pacific Co.*, 620 F.2d 761 (10th Cir.1980). In the present case Mr. Hodges neither named the union as defendant nor alleged any collusion between the union and Santa Fe to effect his discharge.

We discussed in *Richins* the proper disposition of a case involving an employer-employee dispute if the union were not named as a defendant:

> "If this suit had been brought against the Railroad only, we would have no difficulty in determining the proper disposition. The dispute between plaintiffs and the Railroad is clearly a 'minor' one—that is, 'between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates or pay, rules, or working conditions.' 45 U.S.C. § 153 First (i). As the Supreme Court has emphatically told us, 'Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts.'"

Thus plaintiff must pursue the administrative remedies.

AFFIRMED.